Supreme Court, U.S.
FILED

No. 02 6 6 4 AUG 1 4 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

TY MICHAEL BROWN,

Petitioner,

vs.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIV.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

TY MICHAEL BROWN,
TDCJ # 714667
12071 FM 3522
Abilene, TX 79601

50 pd

QUESTIONS PRESENTED

COMMENT: Our first question is a compound, two-part question that predicates our second question and following.

FIRST QUESTION:

a. IS AN UNSKILLED AND UNTUTORED PRO SE LITIGANT EXPECTED TO ARTICULATE OUR CLAIM OF BEING DEPRIVED OF A FAIR TRIAL DUE TO THE ADMISSION OF THE ORAL CONFESSION WITH SUCH LEGAL PRECISION THAT OUR THEORY WITH ITS CONTROLLING LEGAL PRINCIPLES AND THE FACTUAL PREDICATE ARE A BULLS-EYE ON THE STATE LEVEL?

[or]

b. IS IT NOT RATHER ACCEPTABLE TO LIBERALLY CONSTRUE OUR CLAIM AND ALLOW FOR AN INCREASED ARTICULATION AS OUR LEGAL SKILL BECOMES PRECISE DUE TO AN ON-GOING LEGAL EDUCATION IN RESEARCH AND LANGUAGE FROM THE CONTINUING LITIGATION, WHERE OUR FACTUAL PREDICATE AND THE CONTROLLING PRINCIPLES DO BULLS-EYE OUR CLAIM OF BEING DEPRIVED OF A FAIR TRIAL FROM THE ADMISSION OF THE ORAL CONFESSION?

[therefore]

QUESTIONS PRESENTED – Continued

SECOND QUESTION:

IS IT DEBATABLE AMONG JURISTS OF REASON THAT THE FIFTH CIRCUIT IN THEIR DENIAL OF COA DECIDED AN IMPORTANT FEDERAL QUESTION, TO WIT, THE DOCTRINE OF EXHAUSTION, IN A WAY THAT CONFLICTS WITH RELEVANT SUPREME COURT PRECEDENT?

THIRD QUESTION:

IS IT DEBATABLE AMONG JURISTS OF REASON AS TO WHETHER A COA SHOULD HAVE ISSUED ON OUR CLAIM OF BEING DEPRIVED OF A FAIR TRIAL DUE TO THE ADMISSION OF THE ORAL CONFESSION?

FOURTH QUESTION:

WHEN THE SUPREME COURT ADDED A NEW ELEMENT TO THE PROGENY OF MIRANDA LAW IN THEIR *U.S. V. DICKERSON* DECISION OF JUNE 2000, AND PETITIONER'S CLAIM OF BEING DEPRIVED OF A FAIR TRIAL DUE TO THE ADMISSION OF THE ORAL CONFESSION WAS ON-POINT WITH *DICKERSON*, AS WELL AS PENDING IN FEDERAL COURT AT TIME OF DECISION, MUST PETITIONER HAVE FIRST LITIGATED THE CLAIM ON THE STATE LEVEL TO EXHAUST REMEDIES, EVEN THOUGH THE U.S. DISTRICT COURT DID PERUSE THE FULLNESS OF THE CLAIM?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	16

INDEX TO APPENDICES

APPENDIX A:
U.S. FIFTH CIRCUIT COURT OF APPEALS' DECISION ..... App. 1

APPENDIX B:
U.S. DISTRICT COURT'S DECISION ADOPTING THE U.S. MAGISTRATE'S FINDINGS AND CONCLUSION ..... App. 3

APPENDIX C:
U.S. FIFTH CIRCUIT COURT OF APPEALS' DENIAL OF PETITION FOR REHEARING ..... App. 29

TABLE OF AUTHORITIES

Page

CASES:

Beckwith v. United States, 425 U.S. 341 (1977).....11

Blackledge v. Allison, 431 U.S. 63 (1977).....12

Evans v. McCotter, 790 F.2d 1232 (5th Cir. 1986)..9, 13, 15

Granberry v. Greer, 481 U.S. 129 (1987)..... 7

Grey v. Hoke, 933 F.2d 117 (2nd Cir. 1991).....9, 15

Haines v. Kerner, 404 U.S. 519 (1972)..... 9

Hawkins v. Higgins, 898 F.2d 1365 (8th Cir. 1990).....9, 15

Hill v. Lockhart, 28 F.3d 832 (8th Cir. 1994)..... 9

Humphrey v. Cady, 405 U.S. 504 (1972)..... 7

Michigan v. Tucker, 417 U.S. 433 (1974).....11

Moran v. Burbine, 475 U.S. 412 (1986).....11, 13, 14

Picard v. Conner, 404 U.S. 270 (1971)..... 5

Rose v. Lundy, 455 U.S. 509 (1982)..... 6

Slack v. McDaniel, 529 U.S. 473 (2000).....13, 14

Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998)..... 7

U.S. v. Dickerson, 120 S.Ct. 2326 (June/2000).....10, 14, 15

U.S. v. Riascos, 76 F.3d 93 (per curiam) (5th Cir. 1996)..... 9

Whitehead v. Johnson, 157 F.3d 384 (5th Cir. 1998)..... 9

STATUTE AND RULE:

Article 38.22, sections 2, 3, 3(c)..... 2

Rule 10(a) and (c)..... 4

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was MARCH 25, 2002.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 24, 2002, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

We urge the Court that we were deprived of a fair trial in violation of our guaranteed immunities under the 4th, 5th, 6th, and 14th Amendments of the United States

Constitution due to the trial judge invoking the Texas State Statute 38.22, V.A.C.C.P. to circumvent the *Miranda* requirement of an effective waiver.

STATEMENT OF THE CASE

A. INTRO: This is an appeal from the Fifth Circuit's denial of certificate of appealability. In which the merits of our constitutional claim(s) have been denied purview due to the Fifth Circuit's ruling that Petitioner has not exhausted his remedies on:

(1) Being deprived of a fair trial due to the admission of the oral confession in its entirety:

> **a. Via a state statute** that allows for the *Miranda* Requirements to be circumvented,
>
> **b. Via the hearsay testimony of** Sergeant Denholm who claimed he read petitioner the *Miranda* Warnings at time of arrest,
>
> **c. Via the testimony of Detective Brown** who took an oral confession in the back seat of the police vehicle over a forty minute drive and admitted he never gave petitioner his *Miranda* Rights at the time of the oral confession, and,
>
> **d. Via the prejudicial impact these testimonies had** upon the jury to where they would not follow the Judge's Instruction to disregard the oral confession.

B. COURSE OF PROCEEDINGS BELOW (in pertinent part):

(1) AT TRIAL: Petitioner was a first-time offender, indicted for the offense of capital murder, who did not

testify at trial or at the suppression hearing. Pretrial motions were filed, in particular, a motion to suppress the illegally obtained confession and all evidence related thereto. A Jackson Deno hearing was conducted and the record at the suppression hearing reflects:

> a. That the *Miranda* Warnings were read to petitioner at time of arrest, outside the presence of others, by Sergeant Denholm,
>
> b. That the oral confession was voluntary but the *Miranda* Requirements were not met at the time the oral confession was taken by Detective Brown, and,
>
> c. There was no ruling as to an effective waiver of the *Miranda* Requirements due to the state statute allowing for said requirements to be circumvented, if the instrumentality of the crime was discovered as a result of the confession.

(2) **ON APPEAL:** The appellate court affirmed the conviction. Petition for discretionary review was sought and the Texas Court of Criminal Appeals reversed and Remanded on the sufficiency of the facts. The lower court of appeals reaffirmed. A second petition for discretionary review was not sought.

(3) **STATE HABEAS:** Petitioner filed his state level habeas corpus which was "white carded", denied without written order upon the non-written findings of the trial court, other than those recorded at the pretrial suppression hearing.

(4) **FEDERAL HABEAS:** Petitioner filed his federal habeas but was ruled to be time barred under the AEDPA. The Judge, likewise, denied certificate of appealability but the U.S. Fifth Circuit Court of Appeals was gracious and

granted certificate of appealability and eventually reversed and remanded to the U.S. District Court:

> **a.** At which time the Texas attorney general filed their motion for summary judgement which petitioner responded to, the magistrate recommended the motion be granted, dismissing with prejudice the petition. Petitioner objected and the Federal Judge adopted the magistrate's findings and recommendations. Denying thereafter certificate of appealability, and the U.S. Fifth Circuit Court of Appeals would not issue a certificate of appealability due to Petitioner not having previously raised those issues before. Petitioner filed motion for panel rehearing but filed late. An out-of-time motion was granted after other filings but the petition for panel rehearing was denied. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

RULE 10(c):

THE U.S. FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED

AND 10(a):

AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

PROPOSITION:

IT IS DEBATABLE AMONG JURISTS OF REASON AS TO WHETHER PETITIONER WAS DEPRIVED OF A FAIR TRIAL IN VIOLATION OF HIS GUARANTEED IMMUNITIES UNDER THE 4TH, 5TH, 6TH, AND

14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION DUE TO:

OUR CLAIM(S):

(1) THE TRIAL COURT RULED THAT THE CONFESSION WAS INADMISSIBLE BUT THEN, INVOKED A STATE STATUTE TO CIRCUMVENT THE *MIRANDA* REQUIREMENT OF AN EFFECTIVE WAIVER AND ALLOWED THE ORAL CONFESSION TO ENTER INTO EVIDENCE IN ITS ENTIRETY VIA THE TESTIMONIES OF DETECTIVE BROWN AND SERGEANT DENHOLM, EVEN THOUGH PETITIONER DID NOT TESTIFY:

a. RESULTING IN THE JURY NOT FOLLOWING THE COURT'S INSTRUCTION TO DISREGARD THE ORAL CONFESSION.

THEREFORE:

THE U.S. FIFTH CIRCUIT COURT OF APPEAL'S DENIAL OF A CERTIFICATE OF APPEALABILITY ON PETITIONER'S CLAIM(S) BY APPLYING THE EXHAUSTION OF REMEDIES DOCTRINE, DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT SUPREME COURT PRECEDENT.

EXHAUSTION REQUIREMENT DOCTRINE

The progeny of law from the United States Supreme Court has been interpreted by the U.S. Courts' of Appeals with variations. This Court held in *Picard v. Conner*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) that the exhaustion doctrine requires only that the "substance" of the

federal claim (not the form) be "fairly presented" to the state courts. This Court said:

> "It has been settled since *Ex Parte Royall*, 117 U.S. 241 (65 S.Ct. 734, 29 L.Ed 868) (1886), that a state prisoner must normally exhaust state judicial remedies before a federal court will entertain his petition for habeas corpus. . . . The exhaustion-of-state remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. sections 2254(b) and (c), reflects a policy of federal state comity. . . . It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.
>
> "Fair presentation requires that the petitioner provide the state courts with 'an initial' 'opportunity to pass on and correct' alleged violations of its prisoners federal rights." *Id.*

Later in *Rose v. Lundy*, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982), this Court went further and held that "a district court must dismiss habeas petition's containing both unexhausted and exhausted claims." But in the instant case, the respondent stated that petitioner had exhausted his state remedies. Yet, if the magistrate was to find that petitioner had not exhausted his remedies on any claims raised, then he requested the court to allow him to respond accordingly. The magistrate did not address whether petitioner had exhausted his claims and therefore, it would be presumed that the district court did not perceive any unexhausted claims. Even though the claims presented to the district court were the same as those presented to the U.S. Fifth Circuit Court of Appeals, which ruled our claims unexhausted. Successive writ filings are available for litigants who have received a

ruling of not having exhausted his claims. In *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618, 1619 (1998), this Court stated:

> "This Court's cases have never suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust these remedies, and returned to federal court, was by such action filing a successive petition. A court would adjudicate those claims under the same standard as would govern those made in any other first petition." .... "To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons, having nothing to do with the claim's merits, would bar the prisoner from ever obtaining federal habeas review." *Id.*

> **In *Granberry v. Greer***, 481 U.S. 129, 135-136 (1987), "[A]lthough there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies, his failure to do so is not an absolute bar to (federal) appellate consideration of his claims." *Id.*

Finally, in *Humphrey v. Cady*, 405 U.S. 504, 516 n.18 (1972), this Court stated:

> "(the) question . . . is whether any of petitioner's claims is so clearly distinct from the claims he has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim". *Id.*

In the case at bar, petitioner has maintained that he was deprived of a fair trial due to the oral confession being admitted into evidence in its entirety. The issue has always been that petitioner was deprived of a fair trial.

Therefore our first question before the court which we restate:

> **a.** IS AN UNSKILLED AND UNTUTORED PRO SE LITIGANT EXPECTED TO ARTICULATE OUR CLAIM OF BEING DEPRIVED OF A FAIR TRIAL DUE TO THE ADMISSION OF THE ORAL CONFESSION WITH SUCH LEGAL PRECISION THAT OUR THEORY WITH ITS CONTROLLING LEGAL PRINCIPLES AND FACTUAL PREDICATE ARE A BULLS-EYE ON THE STATE LEVEL?
>
> **(or)**
>
> **b.** IS IT NOT RATHER ACCEPTABLE TO LIBERALLY CONSTRUE OUR CLAIM AND ALLOW FOR AN INCREASED ARTICULATION AS OUR LEGAL SKILL BECOMES PRECISE DUE TO AN ON-GOING EDUCATION IN RESEARCH AND LANGUAGE FROM THE CONTINUING LITIGATION, WHERE OUR FACTUAL PREDICATE AND THE CONTROLLING PRINCIPLES DO BULLS-EYE OUR CLAIM OF BEING DEPRIVED OF A FAIR TRIAL FROM THE ADMISSION OF THE ORAL CONFESSION?

Through the state level once and the federal level twice, petitioner has presented his claim of being deprived of a fair trial via the admission of the oral confession with increased precision. The factual predicate has always remained the same, to wit, the trial record, which clearly communicates record facts that are the predicate for our claims of hearsay and the jury not disregarding the oral confession as instructed to do so. Petitioner may not have specifically pointed to the hearsay and jury not disregarding the oral confession as instructed to do so but the

federal petition certainly did and the magistrate did not perceive any unexhausted claims being presented to him. In *Haines v. Kerner*, 404 U.S. 519, 520 (1972), this Court held that pro se complaints are to be held to less stringent standards than formal complaints drafted by lawyers; cf. *U.S. v. Riascos*, 76 F.3d 93, 94-95 (5th Cir. 1996) (per curiam) and, *Hill v. Lockhart*, 28 F.3d 832-35 (8th Cir. 1994) (exhaustion requirement satisfied, even though claim not precisely articulated to state court, but instead in paragraph focusing on different, related claim) with *Hawkins v. Higgins*, 898 F.2d 1365, 1367 (8th Cir. 1990) (exhaustion requirement excused when petitioner raised same issue of law as another state prisoner to whom state courts denied relief).

In the instant case, the FIFTH Circuit cited *Evans v. McCotter*, 790 F.2d 1232, 1238 (5th Cir. 1986). A case which petitioner argued he was distinguished from. Nonetheless, a previous Texas prisoner, *Evans*, had litigated the same state statute governing *Miranda* that petitioner was litigating. Therefore, it could have been excused in the Eighth Circuit. *Id.* Likewise, petitioner would have been procedurally barred on the state level of having to relitigate the claim under said statute. *Grey v. Hoke*, 933 F.2d 117, 120 (2nd Cir. 1991) (exhausting remedies requirement excused when clear that claims would be procedurally barred if presented in state court). As in the case at bar, cf. *Whitehead v. Johnson*, 157 F.3d 384 (5th Cir. 1998) (Habeas petitioner need not spell out each syllable of the claim at issue before the state court to satisfy the exhaustion requirement for federal collateral review).

My Point: because petitioner was a pro se litigant who was unskilled and untutored in the law, without

assistance of legal counsel, has had to draft his state complaint with a bare bones theory of law. He simply complained that he was deprived of a fair trial due to the admission of the oral argument, even though the written and video portions of the oral were suppressed due to *Miranda*, and petitioner did not testify. He claimed no *Miranda* requirements at time of the oral confession and that it was not voluntary or taken with an effective waiver. Then came the federal petition which articulated this claim with greater precision but the respondent sent petitioner off on the tangent of being time-barred. Nonetheless, petitioner continued to language his claim of being deprived of a fair trial to include the hearsay and the fact the jury did not disregard the oral confession as instructed to do so in the Court's charge. **Likewise**, this Supreme Court made its ruling in *U.S. v. Dickerson*, 120 S.Ct. 2326, 2329-30 (June/2000), while petitioner was on the federal level litigating his claim, in which petitioner developed this decision as added proof of being deprived of a fair trial because the facts are parallel. Just as the Judge in *Dickerson* utilized an existing federal statute to circumvent *Miranda*, so too did the trial judge utilize the state statute, article 38.22, sections 2, 3, 3(c), to circumvent a ruling of an effective waiver. The trial court ruled the confession was voluntary which is a FIFTH Amendment ruling but there must also have been an effective waiver under the progeny of law related to *Miranda*. Simply ruling that an arresting officer gave petitioner his *Miranda* Warnings does not, per se, make the oral confession given with an effective waiver. The right to counsel does not apply at time of arrest but only at time of confession. Two separate events at two distinct times by two different officers. We argued that there was no effective

waiver due to the trauma of arrest at gun point, handcuffed and forcefully placed in the back seat of the police car. Where sometime later another officer arrived who presumed petitioner had effectively waived the requirement of counsel being present or that he subjectively understood the *Miranda* requirements and was choosing not to exercise his right. The record does not reflect this. It simply reflects the presumption he waived his rights, but a presumption is no replacement for an effective waiver. Especially when the only officer claiming to have given the *Miranda* Warnings was at time of arrest, and he likewise claimed to have done so in the presence of other officers but this was not believed by the trial judge. This undermines the confidence in the officer's claim of having given the *Miranda* Warnings. Especially when viewed from the law related to the trauma induced into a first-time offender at time of arrest, who is secluded from others and cloistered with only police. Such a condition induces a confession without an effective waiver, which has been our argument. *Moran v. Burbine*, 475 U.S. 412 (1986) (effective waiver requirements delineated); *Michigan v. Tucker*, 417 U.S. 433 (1974) (Heavy burden of proving an effective waiver coupled to petitioner not testifying); *Beckwith v. United States*, 425 U.S. 341, 346 (1977) (state bears heavy burden in proving validity of waiver given "during custodial interrogation"); see also our argument in the appeal brief filed with the U.S. Court of Appeals for the FIFTH Circuit.

(therefore)

SECOND QUESTION:

IS IT DEBATABLE AMONG JURISTS OF REASON THAT THE FIFTH CIRCUIT IN THEIR DENIAL OF

COA DECIDED AN IMPORTANT FEDERAL QUESTION, TO WIT, THE DOCTRINE OF EXHAUSTION, IN A WAY THAT CONFLICTS WITH RELEVANT SUPREME COURT PRECEDENT?

We urge the Court that the FIFTH Circuit upheld the district court's grant of summary judgement contrary to *Blackledge v. Allison*, 431 U.S. 63, 75-76, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) (summary dismissal is only appropriate when allegations in petition are "patently frivolous").

NOT PATENTLY FRIVOLOUS

Our Issue of being deprived of a fair trial due to the admission of the oral confession in its entirety:

a. Via a state statute that allows for the *Miranda* Requirements to be circumvented;

b. Via the hearsay testimony of Sergeant Denholm who claimed he read petitioner the *Miranda* Warnings at time of arrest;

c. Via the testimony of Detective Brown who took an oral confession in the back seat of the police car over a forty minute drive and admitted he never gave petitioner his *Miranda* Rights at the time of the oral confession; and

d. Via the prejudicial impact these testimonies had upon the jury to where they would not follow the Judge's Instruction to disregard the oral confession.

Are not patently frivolous.

The FIFTH Circuit Court of Appeals summarily affirmed the district court's grant of summary judgement by citing *Evans v. McCotter*, 790 F.2d 1232, 1238 (5th Cir. 1986), on conjunction with the claim that the suppression record support an effective waiver due to the arresting officer claiming he read petitioner his *Miranda* Rights, and thereafter, the confession during the custodial interrogation was voluntary. We urge as argued in the U.S. District Court and on appeal to the FIFTH Circuit that *Miranda* at arrest in the midst of an overpowering trauma of being arrested at gun-point, handcuffed, secluded in the back seat of police car, in which a forty minute drive resulted in an erratic oral confession that needed to have sense made of it at the station. These elements coupled to the arresting officer claiming he read the *Miranda* warnings to petitioner in the presence of other officers but the trial judge ruled not so, makes our claim of no effective waiver viable. Rather than "patently frivolous". *Id.*

As for the other issues, declared by the FIFTH Circuit as not being exhausted, are debatable among jurists of reason. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

THIRD QUESTION (restated):

IS IT DEBATABLE AMONG JURISTS OF REASON AS TO WHETHER A COA SHOULD HAVE ISSUED ON OUR CLAIM OF BEING DEPRIVED OF A FAIR TRIAL DUE TO THE ADMISSION OF THE ORAL CONFESSION?

We urge that it is debatable as to whether:

1. The alleged waiver was effective. *Moran v. Burbine*, supra, *i.e.*

> "Full comprehension of the rights to remain silent and request for attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." *Id.* at 427.
>
> Only if "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Fare v. Michael, C.*, 442 U.S. 707, 725 (1979)." *Id.* at 423-424.
>
> "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that at all times he knew he could stand mute and request a lawyer, and that he was aware of the state's intentions to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." *Id.*

The trial record does not reflect the above requirements for an effective waiver. The trial judge did not conduct the above analysis before making his ruling. He ruled the confession at the custodial interrogation was voluntary. He ruled that officer Denholm, outside the presence of others, at time of arrest, read the *Miranda* warnings. He ruled that Detective Brown at time of custodial interrogation did not read petitioner his *Miranda* warnings. These areas are the sum of the trial judge's rulings, and we urge that his ruling does not meet the effective waiver requirements of *Moran v. Burbine*, supra. Therefore it is debatable among jurists of reason. *Slack v. McDaniel*, supra.

FOURTH QUESTION:

WHEN THE SUPREME COURT ADDED A NEW ELEMENT TO THE PROGENY OF *MIRANDA* LAW IN THEIR *U.S. V. DICKERSON*, SUPRA, DECISION OF

JUNE 2000, AND PETITIONER'S CLAIM OF BEING DEPRIVED OF A FAIR TRIAL DUE TO THE ADMISSION OF THE ORAL CONFESSION WAS ON-POINT WITH DICKERSON, AS WELL AS PENDING IN FEDERAL COURT AT TIME OF DECISION, MUST PETITIONER HAVE FIRST LITIGATED THE CLAIM ON THE STATE LEVEL TO EXHAUST REMEDIES, EVEN THOUGH THE U.S. DISTRICT COURT DID PERUSE THE FULLNESS OF THE CLAIM?

We incorporate herein by this reference our previously presented law on the doctrine of exhaustion, and would highlight the fact that to litigate our *Dickerson* claim on the state level would procedurally bar us. Texas has a procedural bar to successive applications. *Grey v. Hoke*, 933 F.2d 117, 120 (2nd Cir. 1991) (Exhaustion requirement excused when clear that claims would be deemed procedurally barred if presented in state court). So too, in the instant case. Likewise, we urge the exhaustion requirement is excused in view of fact that the FIFTH Circuit's reliance on *Evans v. McCotter*, 790 F.2d 1232, 1238 (5th Cir. 1986), where same statute of law relied on. *Hawkins v. Higgins*, 898 F.2d 1365, 1367 (8th Cir. 1990) (Exhaustion requirement excused when petitioner raised same issue of law as another state prisoner to whom state courts denied relief). **Finally**, this Court allows for a petitioner to re-file successive petitions if there be a new law ruled by this Court, though, petitioner has only a year to file. Yet, petitioner was in federal court in June of 2000, when this Court issued its ruling in *Dickerson*. Petitioner was pending before the FIFTH Circuit on the issue of being time barred. In which petitioner at first opportunity raised the *Dickerson* issue in U.S. District Court. Therefore we urge for these reasons we are not barred, and the

exhaustion requirement could have been waived. That it is debatable among jurists of reason.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

/s/ Ty Michael Brown
Ty Michael Brown

DATE: October 29, 2002

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-21037
USDC No. H-98-CV-57

TY MICHAEL BROWN,

Petitioner-Appellant,

versus

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Mar. 25, 2002)

ORDER:

Ty Michael Brown, Texas prisoner # 714667, moves for a certificate of appeal ability (COA) to appeal from the denial of his habeas corpus application. A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires a showing "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Brown contends that his oral statement was given in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The testimony at the suppression hearing in Brown's case supported the finding that Brown was read his *Miranda* rights and that he waived those rights voluntarily. *Evans v. McCotter*, 790 F.2d 1232, 1238 (5th Cir. 1986).

Brown argues for the first time in his appellate COA motion that the jury disregarded an instruction regarding the testimony of a police witness and that another witness's testimony regarding Brown's oral confession was inadmissible hearsay. Because Brown did not raise those arguments in the district court, this court lacks jurisdiction to consider them. *Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1998).

COA DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TY MICHAEL BROWN, Petitioner, V. JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,[1] Respondent.	§ § § § § § § § § § §	CIVIL ACTION NO. H-98-057 (Entered Aug. 24, 2001)

MEMORANDUM AND RECOMMENDATION GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S § 2254 APPLICATION FOR WRIT OF HABEAS CORPUS

Before the Magistrate Judge is Respondent's Motion for Summary Judgment (Document No. 35), Petitioner's Federal Application for Writ of Habeas Corpus (Document No. 1) and Petitioner's Response (Document No. 38) in opposition to Respondent's Motion for Summary Judgment. After considering the submissions of the parties, the state court records, and the applicable law, the Magistrate Judge RECOMMENDS, for the reasons set forth below,

---

[1] On August 1, 2001, Janie Cockrell became the Director of the Texas Department of Criminal Justice, Institutional Division. Pursuant to FED. R. CIV. P. 25(d)(1), Cockrell is substituted as Respondent in this case.

that Respondent's Motion for Summary Judgment (Document No. 35) be GRANTED, Petitioner's Application for Writ of Habeas Corpus (Document No. 1) be DENIED, and that this case be DISMISSED WITH PREJUDICE.

I. Introduction and Procedural History

Ty Michael Brown ("Brown") is currently incarcerated in the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID") as a result of his conviction in Cause No. 681327 in the 262nd District Court of Harris County, Texas. Brown was charged by Indictment with capital murder. The state waived the death penalty and Brown pled not guilty. A jury found Brown guilty of capital murder on June 30, 1994, and he was automatically sentenced to life imprisonment in the TDCJ-ID.

Brown appealed his conviction to the Court of Appeals for the First Judicial District of Texas. The Court of appeals affirmed his conviction in an unpublished opinion on October 5, 1995. *Brown v. State*, No. 01-94-00644-CR. Thereafter, Brown filed a petition for discretionary review with the Texas Court of Criminal Appeals. The Court granted Brown's petition on May 22, 1996, and remanded for consideration of Brown's claims that the evidence was factually insufficient to support the verdict. *Brown v. State*, P.D.R. No. 1288-95. On remand, the Court of Appeals again affirmed Brown's conviction on August 8, 1996.

Brown then filed one state application for writ of habeas corpus, which was denied by the Texas Court of Criminal Appeals on November 26, 1997, without written order on the findings of the state trial court without a hearing. *Ex Parte Brown*, Application No. 35,913-01 at

cover. The instant § 2254 application for writ of habeas corpus was filed January 2, 1998. (Document No. 1).[2]

II. Factual Background

The facts underlying Brown's conviction for capital murder, as found by the Texas Court of Appeals in connection with Brown's direct appeal, are as follows:

> Prakash Shah was working alone in his store on the evening of December 1, 1993. Sylvia Reed worked nearby, and she visited Shah's store just before closing time, 9:00 p.m., to exchange a lottery ticket and ask Shah for a display rack. Shah and Reed were in the back of the store looking for a rack when they heard a customer enter through the front door. Shah told Reed to stay in the back, and he went up front to help the customer. Reed heard Shah say, "Why are you here again tonight? Why you [sic] always come so

---

[2] Respondent initially moved for summary judgment on the basis that this action was untimely filed under 28 U.S.C. § 2244(d). Respondent's Motion for Summary Judgment was granted in a Memorandum and Order entered on February 12, 1999. (Document No. 13). Brown successfully appealed that ruling to the Fifth Circuit Court of Appeals, which determined that equitable tolling might "save" this § 2254 proceeding from dismissal under § 2244(d). (Document No. 20). On remand from the Fifth Circuit, the District Judge ordered Respondent to advise the Court whether he intended to pursue the statute of limitations defense or intended to file a motion for summary judgment addressing the merits of Brown's claims. (Document No. 21). On March 19, 2001, Respondent advised the Court of his intent to file a motion for summary judgment on the merits of Brown's claims. (Document No. 27). On May 31, 2001, such a motion for summary judgment was filed by Respondent. The statute of limitations defense is, therefore, not currently at issue in this case.

close to closing time?" A voice replied, "We have some money tonight, we have some money tonight."

Shah came to the back of the store, lifted a "party ball" of beer out of the freezer, and took it to the customer. Reed then heard the sound of a bottle breaking and a gunshot. Shah ran to the back of the store clutching his chest, and Reed hid behind some boxes. Reed heard three more shots.

When the shots stopped, Reed stepped over Shah's bleeding body and went to the front of the store to call 911. Appellant [Brown] approached Reed with a gun in his hand and shaking his head said, "I'm sorry, ma'am, I'm sorry." Reed, again frightened, ran into a freezer in the back of the store and stayed there until she calmed down enough to come out and call 911. [Brown] was gone when Reed came out, but she later identified him in a police line-up. Reed testified that lottery tickets were lying on the floor that had not been there before Shah was killed. [III SF 139-71]

Sonya Ochoa and Maria Monares saw [Brown] engaged in suspicious activity near the time of the murder. Ochoa visited Shah's store at 9:05 p.m. on the evening before he was killed. When Ochoa opened the door, [Brown] came around and looked at her with a startled look. [Brown] walked up to the counter and told Shah that he was going to pull up his car, and [Brown] stormed out. While Ochoa was purchasing some liquor from Shah, she noticed that he looked once out the window. Ochoa left the store and, as she pulled her car out of her parking space, she saw a car quickly pull in front of the store. A tall man entered the store. Ochoa thought something

suspicious was going on, and she attempted to memorize the license plate on the car. Ochoa later described [Brown]'s appearance for a composite artist, and she identified [Brown] in a police line-up as the man that she saw in Shah's store. [III SF 102]

Between 8:30 p.m. and 9:00 p.m. on the night that Shah was killed, Monares was sitting in a parked car outside a grocery store that was in the same shopping center as Shah's store. Monares saw [Brown] and another person walk away from Shah's store and toward a photo lab at the other end of the center. Monares described [Brown] as tall and thin, and she testified that he was suspicious looking because "he was looking out of the side." [Brown] had something in the back of his shirt. [III SF 114-29]

Deputies Russell Coleman and Daniel Blomberg, and homicide detectives John Denholm, Kyle Brown, and Max Cox investigated the crime scene. The officers found Shah shot and lifeless in the back of the store. The cash register was closed and buzzing. Plastic lottery ticket dispensers were in disarray, and lottery tickets were behind the cash register bar and strewn on the floor. Deputy Blomberg found several boxes with blood spattered on them, three spent shell casings, and blood on the floor. The deputies also recovered a bullet.

Based on the composite sketch and a "crime stoppers" tip, Detective Cox spoke with the manager of [Brown]'s apartment complex and learned that a person matching the suspect's description lived in the complex. The police arrested [Brown] and searched his apartment. They discovered several lottery tickets similar to those that were

found at Shah's store. The tickets had already been scratched, with the winning tickets placed in a beef jerky can on top of the refrigerator and the losing tickets thrown into the garbage can in the kitchen. The tickets were later fingerprinted, but no matching prints were found.

[Brown] was arrested during the search of his apartment. In an oral statement given to the police after his arrest, [Brown] admitted shooting Shah and taking the lottery tickets. [Brown] said that he had become friends with Troy Cherry, who was a security guard at the shopping center where Shah's store was located. [Brown] said that Cherry told him Shah's store did not have a security camera. Cherry told [Brown] to hold up the store and shoot Shah, specifically instructing [Brown] to make sure that Shah died. Cherry also gave [Brown] the .9mm Ruger that was used in the shooting. [Brown] admitted that he had gone into Shah's store on the two evenings before the incident but had lost his nerve before executing the plan.

[Brown] said that he entered the store on the night of the murder and told Shah that he wanted to buy a party ball. Shah went to the back to retrieve the item, and [Brown] shot him three times when he returned. [Brown] could not get the cash register open, so he took some scratch-off lottery tickets and left. [Brown] returned the gun to Cherry, and they drove to [Brown]'s apartment and scratched the lottery tickets.

Pursuant to [Brown's] statement and a phone call from Cherry, police recovered from Cherry's house the gun used in the shooting. Sergeant Lyons, a weapons expert, testified that the

> cartridges retrieved from Shah's store and one of the bullets recovered by the morgue from his body were fired from the gun that police recovered from Cherry's house. [III SF 201-19]

Brown v. State, No. 01-94-00644-CR (October 5, 1995), slip op. *2-3.

III. Claims Presented

Brown raises six claims in his § 2254 petition: (1) that he received ineffective assistance of counsel at trial; (2) that he was convicted with evidence obtained in violation of the 5th and 14th Amendments to the United States Constitution; (3) that evidence presented at trial was factually and legally insufficient to sustain the verdict; (4) that the indictment was defective; (5) that the trial court erred in the judgment and sentence; and (6) that appellate counsel failed to provide effective representation. Each of these claims was presented to the state courts prior to the commencement of this action.

IV. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), when a claim presented in a federal habeas corpus proceeding has already been adjudicated on the merits in a state proceeding, federal review is quite limited. 28 U.S.C. § 2254(d) provides:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

> on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000), the Supreme Court interpreted § 2254(d), as follows:

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

In *Williams*, the Court made it clear, contrary to prior precedent in this Circuit, that the "unreasonable application" inquiry under § 2254(d) is an objective one. *Id.* at 409-410.

The instant federal habeas corpus action was filed on January 2, 1998, after the effective date of AEDPA. It is therefore subject to the current provision of § 2254(d), and no relief is available on claims that were adjudicated on the merits by the state courts if that adjudication neither "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" nor "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

The Texas Court of Criminal Appeals denied Brown's state habeas application without written order on the findings of the trial court without a hearing. The Court of Appeals for the First District of Texas had previously affirmed Brown's conviction twice. *Brown v. State*, No. 01-94-00644-CR (October 5, 1995) and (August 8, 1996). The Texas courts have therefore denied Brown relief on the merits of his claims. *Montoya v. Johnson*, 226 F.3d 399, 403-404 (5th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 2220 (2001), sets the standard for determining whether a state court decision involved an "unreasonable application of clearly established Federal law" as one of objective reasonableness. Federal habeas relief may not be granted if the state court merely applied federal law erroneously. *Id.* at 404.

The adjudication of Brown's claims was neither opposite a conclusion of the Supreme Court on a matter of

law, nor did it confront "facts that are materially indistinguishable from a relevant Supreme Court precedent." *Williams*, 529 U.S. at 405. Moreover, the record is devoid of any citation to Supreme Court precedent that would support any of Brown's allegations and satisfy the AEDPA.

V. Ineffective Assistance of Counsel Claims

In his ineffective assistance of trial counsel claim, Brown alleges that his trial counsel (1) failed to adequately investigate both the facts and law that applied to [Brown's] capital murder charge; (2) failed to interview potential witnesses for the defense; and (3) failed sufficiently to consult with and advise [Brown] in relation to his case. (Document 1, p.3). Further, Brown claims that during jury selection and the trial itself, counsel was not prepared and counsel's representation did not meet the minimum required standards for effective representation. Additionally, Brown claims that counsel was not zealous in his representation and was not the adversary envisioned in *United States v. Cronic*, 466 U.S. 648 (1984).

Ineffective assistance of counsel claims are governed by the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the standard for evaluating the effectiveness of counsel is reasonable performance under prevailing professional norms. This is an objective standard, and gives great deference to counsel under the presumption that the disputed conduct is reasonable. *Id.* at 687-689. *Strickland* sets out a two-prong test for determining whether counsel was ineffective: a petitioner must show that counsel's performance was deficient and must show that the deficient performance

prejudiced the defense to the extent that a fair trial was not possible. *Id.* at 687. The petitioner has the burden to prove both the deficiency and the prejudice prongs in order to be entitled to relief. *United States. v. Chavez*, 193 F.3d 375, 378 (5th Cir. 1999).

Brown's claims of ineffective assistance of counsel, which are not supported by any specific allegations or facts, are conclusional, and will not afford him any relief under *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983). Brown does not identify any potential witnesses counsel should have interviewed, nor does he state what the potential witnesses might have testified to at trial. In addition, he does not allege how the trial would have differed had any of the unidentified potential witnesses been located, interviewed, and allowed to testify. Brown does not state which "facts and applicable law" counsel should have further investigated, nor does he show how the investigation counsel did conduct was inadequate. There is no basis in the record, other than Brown's conclusional allegations, to support Brown's claims of ineffectiveness. It is therefore impossible to conclude that counsel's performance was deficient without any showing of how counsel might have mounted a different representation. "Mere conclusory allegations do not raise a constitutional issue in a habeas corpus proceeding." *Id.* at 1012.

Brown contends that an evidentiary hearing on his ineffectiveness allegations will enable him to present proof to substantiate his claims, and "the records the applicant has requested from the trial court [the Statement of Facts and trial transcript] will evidence and support the factual allegations contained in [his] writ application." (Document No. 1 at 3.) In *Ross*, however, it was made clear that "bare, conclusory allegations unsupported by other indicia of

reliability in the record do not compel a federal district court to hold an evidentiary hearing. . . . a district court does not commit error when it disposes of a habeas petitioner's claims without a full-fledged evidentiary hearing when those claims are unmeritorious, conclusory, and wholly unsupported by the record." *Id.* at 1012 (citing *Pierre v. United States*, 525 F.2d 933 (5th Cir. 1976)).

Brown only makes one substantive factual allegation of ineffective assistance of counsel in his application; and it is based on a faulty premise. Brown alleges in his § 2254 application that:

> counsel failed to hold the trial court to the pretrial motion to suppress applicant's alleged oral confession and the tainted fruit that resulted therefrom. The trial court had already ruled prior to trial that applicant's alleged oral confession could not be used by the State in their prosecution and any evidence obtained from that alleged confession was inadmissable [sic]. Trial counsel's failure to raise this matter with the court outside the presence of the jury and the added failure to make a statement on the record to preserve the issue amounted to deficient performance.

(Document No. 1 at 4).

The record shows that Brown's counsel objected to the admission of the oral confession at a hearing which was conducted during trial, but outside the presence of the jury. The record also shows that the trial court ruled, during trial, but outside the presence of the jury, that the

oral confession was admissible, but instructed the jury to disregard the confession if it found that Brown was not given his *Miranda*[3] warnings by Detective Brown prior to the confession. (S.F. Vol. III at 237-263; S.F. Vol. IV at 269-314.) The trial court made no ruling prior to trial that the oral confession was inadmissible. Because Brown's allegations are contradicted by the trial record, and because the trial court's rejection of counsel's motion to suppress the oral confession does not mean that counsel was ineffective, no relief is available on this ineffectiveness allegation.

Brown alleges that representation "did not meet the minimum required standards for effective representation." That standard, under *Strickland*, is "reasonable performance under prevailing professional norms." Because Brown has not shown with any specificity how trial counsel's performance fell below the standard of reasonableness, and because Brown has not shown how his defense was prejudiced by counsel's performance, no relief is available on any of Brown's ineffectiveness claims.

VI. 5th and 14th Amendments Claims

Brown next claims that the trial court abused its discretion by allowing the State to introduce evidence obtained in violation of the 5th and 14th Amendments to the United States Constitution. Brown contends that because he was not properly read his *Miranda* rights as mandated by TEX. CODE CRIM. P. ANN. art. 38.22(3)(c) (West 2001), the evidence of his oral confession was

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

admitted in error. In addition, Brown alleges that the trial court unreasonably applied Supreme Court precedent in allowing the admission of the oral confession: "the state trial court unreasonably applied Supreme Court precedent in its ruling [to include the oral confession]" and that it chose to "overrule the constitutional requirements of *Miranda*." Petitioner's Response to Respondents' Motion for Summary Judgment (Document No. 38 at 11.) Brown claims that his confession was improperly admitted because his *Miranda* rights had not been read to him by the detective who took his oral confession and instead were read to him by another detective. The trial court chose to admit the oral confession as it "contained assertions of facts or circumstances that were found to be true and that tended to establish the guilt of the accused."

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court ruled that the Fifth Amendment right against self-incrimination and the right to assistance of counsel must be made known to a suspect in custody before police may proceed with interrogation. *Dickerson v. United States*, 530 U.S. 428 (2000) reaffirmed *Miranda* and held that the warnings required by *Miranda* are constitutionally based. The court in *Miranda* ruled that

> [t]he prosecution may not use statements . . . stemming from a custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be informed that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights,

> provided the waiver is made voluntarily, knowingly and intelligently.

Miranda, 384 U.S. at 444. Brown claims that his *Miranda* rights were improperly read to him, and that his right to due process was thereby violated. Brown cites the Texas state law, article 38.22(c)(3) of the Texas Code of Criminal Procedure as support for his claim that his *Miranda* warnings were improperly administered.

The record reflects that Brown's *Miranda* warnings were read to him by Sergeant Denholm upon his arrest. Brown was ther seated in the back of the police car. Sitting next to him was Detective Brown, who took Brown's oral confession while Sergeant Denholm drove the car to transport Brown to the Harris County Jail. Sergeant Denholm overheard the conversation between Detective Brown and Brown. Upon reaching the jail, Detective Brown took both a written confession and a videotaped confession from (petitioner) Brown. Although Brown contends that Texas law requires that his *Miranda* rights be read by the same officer who takes a suspect's confession, federal law only requires that the warnings set out in *Miranda* be read and that the suspect understand his rights. The *Miranda* ruling does not mandate that the rights be read by the same officer who takes a suspect's confession; and no Supreme Court precedent since has delivered such a requirement.

Regardless of whether the state law requirements for reading a custodial suspect his rights, TEX. CODE CRIM. P. ANN. art. 38.22, have been complied with, for the purposes of a federal habeas proceeding, the only federal constitutional requirements are those set by *Miranda*. *Evans v. McCotter*, 790 F.2d 1232, 1238 n.6 (5th Cir.), cert. denied,

479 U.S. 922 (1986). The proper standard under *Miranda* is whether the defendant "knowingly and intelligently waived his right[s]." *Etheridge v. Johnson*, 49 F.Supp.2d 963, 983 (S.D. Tex. 1999), *dism'd*, 209 F.3d 718 (5th Cir.), *cert. denied*, 531 U.S. 945 (2000). The record reflects that Brown knowingly and intelligently waived his rights when he agreed to speak with police at the time of his arrest. In *Evans v. McCotter*, 790 F.2d 1232 (5th Cir. 1986), the court ruled that where a defendant was notified of his rights and voluntarily waived them, and was then questioned further three hours later, he could not claim that he was not aware of his rights the second time. Similarly, Sergeant Denholm testified that he read Brown his rights under *Miranda* and that Brown indicated he understood them. Whether Brown was read his rights a second time, this time by Officer Brown, does not raise a federal constitutional issue. Federal law does not mandate the additional requirement to which Brown refers. Supreme Court precedent requires *Miranda* warnings to be administered, but does not require that the particular officer who administers them be the same individual who takes the confession. There was no *Miranda* violation under clearly established federal law, and therefore Brown's claim fails under the AEDPA.

Had the oral confession been improperly admitted under state law, such error would not entitle Brown to any relief in this proceeding. A federal habeas corpus writ may not be granted on grounds of error of state law. *Brown v. Collins*, 937 F.2d 175, 182 (5th Cir. 1991). The prosecution's failure to satisfy the requirements of a state-law rule, "and a state court's failure to enforce that purely state rule, simply would not warrant constitutional attention." *Id.*

Finally, even if Brown had made a showing that the trial court erred under federal constitutional standards in admitting his oral confession, Brown would only be entitled to relief on such an error if he could to [sic] show that the error caused actual prejudice in that it rendered his trial fundamentally unfair. *Bailey v. Procunier*, 744 F.2d 1166, 1168 (5th Cir. 1984) (" . . . a state defendant has no constitutional right to an errorless trial (citing *Banks v. McGougan*, 717 F.2d 186, 190 (5th Cir. 1983)). Indeed, this Court will grant federal habeas corpus relief only when the trial judge's error is so extreme that it constitutes a denial of fundamental fairness under the Due Process Clause." Because there was sufficient evidence of Brown's guilt notwithstanding the oral confession, Brown has not shown any prejudice resulting from the alleged error. Accordingly, Brown is entitled to habeas relief on this claim.

VII. Insufficient Evidence Claim

Brown's third claim is that the evidence was legally and factually insufficient to sustain the court's verdict. The Supreme Court set the standard for evaluating the sufficiency of the evidence in a federal habeas corpus proceeding in *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, an applicant is entitled to relief "if it is found that upon the evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." The reviewing court must review the evidence in the light most favorable to the prosecution. *Id.* at 308.

Brown contends that since evidence of his oral confession was improperly admitted, it should not be considered

when determining whether the evidence was sufficient. However, as set forth above, evidence of Brown's oral confession was properly admitted. Notwithstanding the oral confession, there was sufficient evidence under *Jackson* to support Brown's conviction.[4]

In addition to the oral confession, the evidence at trial consisted of strong eyewitness testimony which placed Brown at the crime scene both before, during, and after the murder, as well as numerous lottery tickets which were found at Brown's apartment and which matched those that had been taken from the store at the time of the murder. Based on this evidence, it was reasonable for the jury to conclude that Brown committed robbery and murder. The jury weighed the credibility of the witnesses and returned a verdict against Brown. On federal habeas review, a "federal court may not substitute its own judgment regarding the credibility of witnesses for that of the state courts." *Marler v. Blackburn*, 777 F.2d 1007, 1012 (5th Cir. 1985). The issue is not whether this Court could

---

[4] In *Pemberton v. Collins*, 991 F.2d 1218 (5th Cir. 1993), *cert. denied*, 510 U.S. 1025 (1993), it was held that for purposes of federal habeas corpus petitions, a federal court could consider a confession which was admitted at trial but was later deemed inadmissible under state law in determining sufficiency of evidence as long as its admission did not create a constitutional problem. The court in *Pemberton*, faced with evidence of an inadmissible confession, considered whether the confession was voluntary. In deciding that it was, the court applied a "harmless error" analysis to determine that the confession could be included in the sufficiency of the evidence inquiry. Brown's confession was never deemed inadmissible; and this Court has determined that it was properly admitted. No constitutional violation is created by considering the confession with the other evidence. Therefore, there is no reason to exclude evidence of the oral confession when determining sufficiency of the evidence.

have reached the conclusion that the trial jury reached, but "whether rational jurors could reach the conclusion that these [jurors at trial] reached." *Roehler v. Borg*, 945 F.2d 303, 306 (9th Cir. 1991).

The testimony and evidence presented was sufficient to permit the jury that Brown committed robbery and that he committed murder. The Court of Appeals addressed the sufficiency of the evidence, and concluded that the evidence was sufficient for a rational juror to conclude that Brown committed the murder of Shah. The state court's decision was not contrary to established federal law or Supreme Court precedent. Accordingly, Brown is not entitled to relief on his insufficient evidence claim under 28 U.S.C. § 2254(d).

VIII. Defective Indictment Claim

In Brown's fourth claim, he alleges, in conclusional form without any supporting facts or allegations, that the indictment was fundamentally defective. Brown does not allege how the indictment was defective, nor does he point to any language in the indictment or any case law to support this claim.[5]

The standard set forth in *McKay v. Collins*, 12 F.3d 66, 68 (5th Cir.), *cert. denied*, 513 U.S. 854 (1994), is that "the sufficiency of a state indictment is not a matter for federal habeas relief unless it can be shown that the

[5] The same conclusional claim, without any supporting facts or allegations, was raised by Brown in his state application for writ of habeas corpus.

indictment is so defective that it deprives the state court of jurisdiction." Brown has not made a showing that the indictment was so defective that it deprived the state court of jurisdiction. In addition, Brown has not shown that the indictment failed to provide him notice of the charges against him for purposes of due process under the 14th Amendment. *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Ables v. Scott*, 73 F.3d 591, 593 (5th Cir.), *cert. denied*, 517 U.S. 1198 (1996). Thus, no relief is available on this claim.

IX. Judgment and Sentence Claim

In his fifth claim, Brown contends that the findings of the trial court contained in the judgment and sentence are legally incorrect as a matter of law. He does not state any federal constitutional issue regarding this claim, and it appears that this claim is merely a restatement of his insufficient evidence claim. If it is not, Brown has not alleged how the judgment and sentence are incorrect and therefore has failed to state claim upon which relief may be granted.

X. Ineffective Assistance of Appellate Counsel Claim

In his final claim, Brown argues that appointed appellate counsel failed to prosecute a meaningful appeal and that he was thereby denied his Sixth Amendment right to effective assistance of appellate counsel. Brown also states that because he was not provided with a copy of his trial court records he was hindered in his access to the courts.

An appellate brief was filed on Brown's behalf by his appellate counsel, who had access to the state trial record.

Brown provides no basis to conclude that appellate counsel's performance was deficient, or that any prejudice resulted from appellate counsel's performance. *Strickland*, 466 U.S. at 687. His only allegation is that the courts did not furnish him with a copy of his transcript. There is no federal constitutional requirement that the state provide an appellant with his own copy of trial court transcripts free of charge. "If a defendant is represented by counsel on appeal who has a copy of the trial transcript, there is no constitutional requirement that the defendant also be provided with physical custody of a copy of the transcript." *Hooks v. Roberts*, 480 F.2d 1196, 1198 (5th Cir. 1973), *cert. denied*, 414 U.S. 1163 (1974). Brown's failure to obtain a copy of the trial court transcript does not evidence ineffective assistance of appellate counsel and does not evidence that he was hindered in his access to the courts. Brown is therefore not entitled to relief on this claim.

XI. Conclusion and Recommendation

Based on the foregoing, and the conclusion that no relief is available to Petitioner Ty Michael Brown on the claims he has asserted in this proceeding pursuant to 28 U.S.C. § 2254, the Magistrate Judge

RECOMMENDS that Respondent's Motion for Summary Judgment (Document No. 35) be GRANTED, Petitioner Ty Michael Brown's § 2254 Application for Writ of Habeas Corpus (Document No. 1) be DENIED, and this case be DISMISSED WITH PREJUDICE.

The Clerk shall file this instrument and provide a copy to all counsel and unrepresented parties of record. Within 10 days after being served with a copy, any party may file written objections pursuant to 28 U.S.C.

§ 636(b)(1)(C), Fed. R. Civ. P. 72(b), and General Order 80-5, S.D. Texas. Failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Ware v. King*, 694 F.2d 89 (5th Cir. 1982), *cert. denied*, 461 U.S. 930 (1983); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc). Moreover, absent plain error, failure to file objections within the ten day period bars an aggrieved party from attacking conclusions of law on appeal. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1429 (5th Cir. 1996). The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208.

Signed at Houston, Texas, this 23rd day of August, 2001.

/s/ Frances H. Stacy
FRANCES H. STACY
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TY MICHAEL BROWN, Petitioner, v. JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,[1] Respondent.	§ § § § § § § § § §	CIVIL ACTION NO. H-98-057 (Entered Sept. 28, 2001)

ORDER ADOPTING RECOMMENDATION OF THE MAGISTRATE JUDGE

Pending is Respondent's Motion for Summary Judgment (Document No. 35). The Court has received from the Magistrate Judge a Memorandum and Recommendation recommending that Respondent's Motion for Summary Judgment (Document No. 35) be GRANTED. Petitioner has filed Objections to the Magistrate's Recommendation (Document No. 43). The Court, after having made a *de novo* determination of Respondent's Motion for Summary Judgment, and Petitioner's Objections, is of the opinion that the findings and recommendations of the Magistrate

[1] On August 1, 2001, Janie Cockrell became the Director of the Texas Department of Criminal Justice, Institutional Division. Pursuant to FED. R. CIV. P. 25(d)(1), Cockrell is substituted as Respondent in this case.

Judge are correct and should be and hereby are accepted by the Court in their entirety. Accordingly,

It is ORDERED and ADJUDGED for the reasons set forth in the Memorandum and Recommendation of the United States Magistrate Judge signed August 23, 2001, and entered on August 24, 2001, which is adopted in its entirety as the opinion of this Court, that Respondent's Motion for Summary Judgment (Document No. 35) is GRANTED.

The Clerk will enter this Order and send copies to all parties of record.

Signed at Houston, Texas this 26th day of September, 2001.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TY MICHAEL BROWN, Petitioner, v. JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent.	§ § § § § § § § § § §	CIVIL ACTION NO. H-98-057 (Entered Sept. 28, 2001)

FINAL JUDGMENT

It is ORDERED and ADJUDGED for the reasons set forth in this Court's separate Order Adopting Recommendation of the Magistrate Judge, and the Memorandum and Recommendation of the Magistrate Judge signed August 23, 2001, and entered on August 24, 2001, which Memorandum is adopted in its entirety as the opinion of this Court, Respondent's Motion for Summary Judgment (Document No. 35) is GRANTED, and Petitioner Ty Michael Brown's Federal Application for Writ of Habeas Corpus (Document No. 1) is DISMISSED WITH PREJUDICE on the merits.

This is a FINAL JUDGMENT.

The Clerk will enter this Order and send copies to all parties of record.

SIGNED at Houston, Texas, this 26th day of September, 2001.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-21037

TY MICHAEL BROWN

Petitioner-Appellant

v.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

(Filed May 24, 2002)

Before JONES, SMITH and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's "Motion to Reconsider Clerk's Action" treated as a motion to file petition for reconsideration out of time is GRANTED.

A member of this panel has previously denied appellant's motion for Certificate of Appealability. After consideration by this panel upon request of appellant, IT IS

FURTHER ORDERED that appellant's petition for reconsideration is DENIED.